Supreme Court, U.S.
FILED
APR 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1472

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

OWENS-ILLINOIS, INC., et al.,
Petitioners,

v.

BRUCE E. DANFIELD, et ux.,
Respondents.

BRIEF OF RESPONDENTS BRUCE E. DANFIELD, ET UX., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

James C. Gavin
(Counsel of Record)
GAVIN & GAVIN, P.A.
28 Tanner Street
Haddonfield, NJ 08033
(609) 429-8200
Attorneys for Respondents Bruce E. Danfield, et ux.

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

22pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
COUNTERSTATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. THE OPINION OF THE THIRD CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT AND THE FIFTH CIRCUIT COURT OF APPEALS	11
II. THE THIRD CIRCUIT CORRECTLY FOUND THAT THE NEW JERSEY SUPREME COURT'S CLASSIFICATION WAS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL INTEREST	14
III. THE FEDERAL RULES OF EVIDENCE DO NOT APPLY TO PROCEEDINGS BEFORE A STATE SUPREME COURT	17
CONCLUSION	18

TABLE OF AUTHORITIES

CASES: Page

Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982) ..... passim

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971). 9, 13, 14

Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 95 S. Ct. 127, 42 L.Ed.2d 107 (1974) 2, 5, 8, 11, 12, 13, 18

Campolongo v. The Celotex Corp., No. 82-2953 (D.N.J. March 1, 1988) 9, 15, 16

Conley v. Johns-Manville Sales Corp., No. 80-2841 (D.N.J. complaint filed Aug. 28, 1980) 12

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 18

Feldman v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374 (1984)... 3, 4, 5, 7, 8, 11, 12, 13, 14, 16

Fischer v. Johns-Manville Corp., 103 N.J. 643, 512 A.2d 466 (1986) 7, 8, 10, 14, 15, 16

Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 432 A.2d 925 (1981) 2

Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985) 12

Gogol v. Johns-Manville Sales Corp., 595 F. Supp. 971 (D.N.J. 1984) 6

Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982), *rev'g* 509 F. Supp. 1353 (E.D. Tex. 1981) 10, 13, 14

In Re Asbestos Litigation, 628 F. Supp. 774 (D.N.J 1986), *aff'd*, 829 F.2d 1233 (3rd Cir. 1987)... 7

TABLE OF AUTHORITIES—*(Continued)*

CASES: Page

In Re Asbestos Litigation, 829 F.2d 1233 (3rd Cir. 1987), *aff'g*, 628 F. Supp. 774 (D.N.J. 1986) 8, 9, 11, 13

In The Matter of Asbestos Litigation Venued in Middlesex County, No. L-52237-81 (N.J. Super. Ct., Law Div.), *aff'd*, 99 N.J. 201, 491 A.2d 700 (1984) 5, 6, 17

In The Matter of Asbestos Litigation Venued in Middlesex County, 99 N.J. 201, 491 A.2d 700 (1984) 6, 18

Kremer v. Chemical Construction Corp., 456 U.S. 461, *reh'g denied*, 458 U.S. 1133 (1982) 9, 13

Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979) 9, 13, 14

Wolozen v. Johns-Manville Sales Corp., No. 80-1413 (D.N.J. complaint filed May 15, 1980) 15

STATUTES:

New Jersey Products Liability Act of 1987, N.J. Stat. Ann. §§ 2A:58C-1 - 2A:58C-7 (West 1987) . . 9, 16

RULES:

Fed. R. Evid. 101 17

Fed. R. Evid. 201 . . . . . 10, 17

MISCELLANEOUS:

U.S. NAVY, U.S. MARITIME COMMISSION, MINIMUM REQUIREMENTS FOR SAFETY AND INDUSTRIAL HEALTH IN CONTRACT SHIPYARDS (1943) 15, 16

No. 87-1472

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

OWENS-ILLINOIS, INC., et al.,
Petitioners,

v.

BRUCE E. DANFIELD, et ux.,
Respondents.

BRIEF OF RESPONDENTS BRUCE E. DANFIELD, ET UX., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The instant petition is based upon a decision of the United States Court of Appeals for the Third Circuit which considered a series of decisions at both the trial and appellate levels of the New Jersey State courts as well as the Federal District Court for the District of New Jersey.

In *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982) the New Jersey Supreme Court held that the state of the art defense was unavailable to a manufacturer or supplier of a dangerous or defective product in a strict liability failure to warn setting. There the court reviewed the decision of the trial

court in six consolidated cases wherein plaintiffs had moved to strike the state of the art defense citing the New Jersey Supreme Court's earlier decision in *Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229, 432 A.2d 925 (1981).

The trial court had denied plaintiffs' motion holding that *Freund* created a rebuttable presumption of defendants' knowledge of the dangers of their products. The trial court had held that the presumption could be overcome by proof that the dangers were "unknowable" at the time of manufacture. *Beshada*, 90 N.J. at 199, 447 A.2d at 543.

The Supreme Court of New Jersey granted certification. Although the motion below was made in only six consolidated cases, the court permitted the appearance of several amicus counsel representing every conceivable type of asbestos case. Plaintiffs in the amicus cases included brake mechanics, plant workers, insulation workers, persons exposed to asbestos textiles, as well as household contacts. In its brief, amicus, Owens Illinois made reference to the state of the art defense which it intended to offer at the time of trial.

In discussing the defendants' contentions in *Beshada*, the New Jersey Supreme Court displayed a significant grasp of the thrust of the proffered state of the art defense. *Id.* at 197, 447 A.2d at 512. This discussion revealed that the state of the art defense advanced by the defendants was in no way different than that discussed by the Fifth Circuit in some detail ten years earlier in *Borel v. Fibreboard Paper Products Corporation*, 493 F.2d 1076, 1083-86 & nn. 4-16 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

The New Jersey Supreme Court observed that the defendants themselves admitted that the dangers of asbestos to at least one group of industrial workers had been known for decades. *Beshada*, 90 N.J. at 197, 447 A.2d at 542, 543. Additionally, the court noted the special role that the latency of asbestos diseases played

in the litigation. *Id.* at 196, 447 A.2d at 542. Moreover, the court stated "[R]egardless of the utilities and risk of a product without warnings, a warning can generally be added without diminishing utility." *Id.* at 201, 447 A.2d at 545 n.5.

After discussing the nature of the action before it, the New Jersey Supreme Court went on to eliminate the state of the art defense in strict liability failure to warn cases, reasoning that relieving the victim of the burden of proving the extent of a manufacturer's actual or constructive knowledge would promote the socially desirable goal of compensating innocent victims. *Id.* at 209, 447 A.2d at 549.

Observing that "fairness suggests that manufacturers not be excused from liability because their prior inadequate investment in safety rendered the hazards of their products unknowable," the court suggested that the introduction of the evidence proffered by the defendants might easily confuse a jury. *Id.* at 208, 447 A.2d at 548. Finally, the court reasoned that the goal of compensation of innocent victims would likewise be furthered by the risk spreading that the removal of this defense would promote. *Id.* at 206, 447 A.2d at 547.

After *Beshada*, it was generally held that the preclusion of the state of the art defense barred the discussion of the actual or constructive knowledge of a manufacturer for any reason in a products liability case involving strict liability failure to warn. However, two years later, the Supreme Court of New Jersey clarified its position in the case of *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374 (1984). There, the court noted that in every strict liability failure to warn case, a two part analysis must apply.

In the first prong of this analysis, knowledge of the dangers of a product is imputed to a manufacturer or supplier. However, in its discussion of the second prong of the liability analysis, the New Jersey Supreme Court made it very clear that the actual and constructive

knowledge of the defendant would not be completely irrelevant but rather would be admissible only where a defendant could show that a reasonable manufacturer, knowing of the dangers that the product presented, would still market the product without warnings, or with the type of warnings that had actually been given. Feldman, 97 N.J. at 451, 479 A.2d at 385.

Thus, in a complete failure to warn context, the defendant would be permitted to establish that it was impossible for him to have perceived enough information about the offending agent to have fashioned a warning which would have avoided or reduced the risk of injury.

In discussing a manufacturer's burden of proof on the second prong of the strict liability analysis, the New Jersey Supreme Court reaffirmed its observation in *Beshada* that the deficient development of a particular state of the art is often a reflection of the lack of investment in safety research by the industry involved. In doing so, the court placed an exceptionally heavy emphasis on the duty of the manufacturer "to be informed and affirmatively to seek out information concerning the public's use of its own product". *Feldman*, 97 N.J. at 453, 479 A.2d at 387. The court held that a manufacturer "will be deemed to know of reliable information generally available or reasonably obtainable in the industry or in the particular field involved." *Id.* Finally, the court observed that information regarding the dangers of a product "need not be limited to that furnished by experts in the field, but may also include material provided by others". *Id.*

Recognizing that its decision might be read to conflict with its earlier holding in *Beshada*, the court specifically drew a distinction between "typical" and "non-typical" products liability cases. The New Jersey Supreme Court further noted "in passing, that, although not argued and determined in *Beshada*, there were or may have been data and other information generally

available, aside from scientific knowledge, that arguably could have alerted the manufacturer at an early stage in the distribution of its product to the dangers associated with its use". *Id.* at 455, 479 A.2d at 388.

Shortly after the New Jersey Supreme Court's decision in *Feldman*, defendant Owens Illinois moved before the Superior Court of New Jersey and the Federal District Court of New Jersey in a variety of cases for leave to introduce its actual and constructive knowledge of the dangers of its product at the time of its manufacture. Defendant Raymark Industries joined in these applications. The proffered defenses were identical to those previously before the New Jersey Supreme Court in *Beshada*, and the defenses described extensively by the Fifth Circuit in *Borel*.

The first trial court to evaluate the defendants' motion was the Honorable John E. Keefe of the Superior Court of New Jersey. *In The Matter of Asbestos Litigation Venued In Middlesex County*, No. L-52237-81 (N.J. Super Ct. Law Div.), *aff'd*, 99 N.J. 201, 491 A.2d 700 (1984). (Reprinted in the Appendix hereto at 1a to 4a).[1] In a consolidated motion involving hundreds of various types of asbestos cases pending in Middlesex County, the entire asbestos bar of the state was invited to file briefs and participate in oral argument. Appearing to argue before Judge Keefe were defendants Owens Illinois, Raymark, and Ford Motor Company (as a supplier of asbestos-containing automotive products). Defendants argued that the New Jersey Supreme Court's decision in *Feldman* constituted a complete abandonment of its prior reasoning in *Beshada*.

Reasoning that the New Jersey Supreme Court's holding in *Beshada* could apply to other types of cases besides those involving asbestos, the trial court fixed

---

1. Hereinafter citations to the Appendix will be stated as: App. ___ a.

upon the New Jersey Supreme Court's distinction between the "typical" and "atypical" products liability case. The trial court then went on to define the special circumstances of asbestos litigation which compelled the denial of defendants' motion. Among these circumstances were considerations of the vast number of injured victims, the long latency of the development of asbestos related disease; and the innate difficulty of intelligently trying the issue of state of the art in those cases. *In the Matter of Asbestos Litigation Venued In Middlesex County*, transcript of proceedings of September 9, 1984, pp. 94-95. App. 2a, to 3a.

On the Federal District Court level, the Honorable John F. Gerry, U.S.D.J. evaluated defendants' claims of a violation of equal protection. In rejecting defendants' claims, Judge Gerry noted that asbestos cases were markedly different than other products liability cases due to their number and difficulty. *Gogol v. Johns-Manville Sales Corp.*, 595 F. Supp. 971, at 974, 975 (D.N.J. 1984).

Subsequently, the Supreme Court of New Jersey granted defendants' request for certification and review of Judge Keefe's decision in *In the Matter of Asbestos Litigation Venued in Middlesex County*. Defendants specifically argued that the New Jersey Supreme Court's refusal to overrule *Beshada* carved out a special classification for asbestos manufacturers that would apply to absolutely no other manufacturer of any other type of products. Thus, the defendants argued that the court's refusal to overrule *Beshada* violated the constitutional guarantee of equal protection. The New Jersey Supreme Court, without written opinion, summarily affirmed the decision made by Judge Keefe below. *In the Matter of Asbestos Litigation Venued in Middlesex County*, 99 N.J. 201, 491 A.2d 700 (1984).

Thereafter, the Federal District Court for the District of New Jersey consolidated several motions challenging the constitutionality of the New Jersey Supreme

Court's decision. These motions resulted in the District Court's opinion entitled *In Re Asbestos Litigation*, 628 F. Supp. 774 (D.N.J. 1986). A majority of the District Court held that the application of *Beshada* principles to asbestos litigation was not violative of equal protection principles. Noting that asbestos cases were markedly different from the "typical" products liability case, the District Court made special reference to the factors previously set forth by Judge Keefe. *Id.* at 777, 778.

The dissent argued that the potential introduction of state of the art evidence on other aspects of the case, such as punitive damages, automatically destroyed the ability of *Beshada* to streamline litigation and reduce jury confusion. *In Re Asbestos Litigation*, 628 F. Supp. at 781. Additionally, the reasoning of the dissent was based upon the assumption that defendants in asbestos cases were being denied a "potentially exculpatory defense" under *Feldman*. *Id.* at 780.

After certification pursuant to 28 U.S.C. §1292(b), an appeal was taken to the Third Circuit. While the matter was pending before the Third Circuit, the New Jersey Supreme Court rendered a decision which had a direct impact on many of the arguments advanced by the present petitioners. In *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466 (1986), the New Jersey Supreme Court made it abundantly clear that its decision in *Feldman* was not an abandonment of its reasoning in *Beshada*. The court reaffirmed its decision to strike the state of the art defense in asbestos cases and, in so doing, removed any speculation as to whether or not the state of the art defense, as proffered by the asbestos defendants, could ever rise to satisfy the standards set forth in *Feldman*.

In *Fischer*, the New Jersey Supreme Court found that evidence adduced at trial fully supported a jury's award of punitive damages against Johns-Manville Corporation. The court's discussion of the evidence made reference to the existence of published scientific articles

between 1936 and 1941 which documented the known hazards of asbestos exposure and the available protective measures which could have been employed to safeguard workers. *Fischer*, 103 N.J. at 650, 512 A.2d at 469. The court went on to hold that additional evidence supported a finding that Johns-Manville had possessed actual knowledge of the dangers of its product.

In their brief to the Third Circuit, respondents directly challenged the dissent's assumption that petitioners could ever present a legally sufficient state of the art defense under the standard set forth in *Feldman*. Noting that the proffered defense had previously been delineated in some detail by the Fifth Circuit Court of Appeals in *Borel*, respondents called attention to the fact that the defense proffered by the petitioners contained several admissions which were fatal to the *Feldman* analysis.

The Third Circuit upheld the District Court's ruling that the New Jersey Supreme Court's decision did not violate the Fourteenth Amendment. In the lead opinion, Judge Weis opined that *Feldman* did not necessarily apply to all other non-asbestos products liability cases. *In Re Asbestos Litigation*, 829 F.2d 1233, 1241 (3rd Cir. 1987). Moreover, Judge Weis observed that one of the underlying reasons for the New Jersey Supreme Court's decision in *Feldman*, was its recognition that the state of the art defense could not be sustained by the asbestos defendants. *Id.* Among further justifications for the distinction was the desirability of simplifying the fact finding process, elimination of jury confusion, and the resultant easing of plaintiff's burden in recovering compensatory damages. *Id.* at 1243.

In a concurring opinion, Judge Becker agreed that an underlying basis for the *Feldman* decision was the New Jersey Supreme Court's view that the generally available information brought to its attention in *Beshada*

provided sufficient constructive knowledge to the asbestos industry to defeat the state of the art defense as a matter of law. *Id.* at 1245 (Becker J., concurring).

Subsequently, the New Jersey State Legislature has enacted a statute which draws clear distinctions between typical products liability actions and those involving environmental torts such as asbestos litigation. This statute involves the application of both substantive and procedural changes in existing tort law. New Jersey Products Liability Act of 1987, N.J. Stat. Ann. §§ 2A:58C-1 - 2A:58C-7 (West 1987). (Reprinted in the Appendix hereto at 17a to 23a).

More recently, in a case *sub judice*, the Honorable Alfred M. Wolin, U.S.D.J. combined the application of *Beshada* principles with those of concurrent cause to fashion a streamlined and simplified compensatory damage trial in a case where plaintiff still retained his claim for punitive damages. By preventing both plaintiffs and defendants from introducing conduct related proofs in the strict liability compensatory damage phase of the trial, the trial court created a compensatory damage trial that was both streamlined and fair to all parties. *Campolongo v. The Celotex Corp.*, No. 82-2953 (D.N.J. March 1, 1988). (Reprinted in the Appendix hereto at 5a to 16a).

SUMMARY OF ARGUMENT

Petitioners seek a writ of certiorari claiming that the Third Circuit's opinion directly conflicts with this Court's holdings in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979) and *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, *reh'g denied*, 458 U.S. 1133 (1982). Petitioners claim that principles of this Court's holdings were violated in that the New Jersey Supreme Court and subsequently, the Third Circuit employed the offensive use of

collateral estoppel to preclude petitioners from advancing a state of the art defense.

In point of fact, collateral estoppel was not employed by either the New Jersey Supreme Court or the Third Circuit in reaching their respective decisions. Accordingly, the instant case is entirely inappropriate for consideration of the procedural prerequisites for the application of the collateral estoppel doctrine.

Similarly, petitioners seek a writ of certiorari based upon their contention that the Third Circuit's opinion directly conflicts with the Fifth Circuit's opinion in *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982), *rev'g* 509 F. Supp. 1353 (E.D. Tex. 1981). Once again, petitioners' request is based upon the misguided assumption that the New Jersey Supreme Court and the Third Circuit employed the doctrine of collateral estoppel in reaching their decisions. Accordingly, no genuine conflict between the Circuits exists which would require resolution by this Court.

Petitioners further seek a writ of certiorari based upon their contention that the New Jersey Supreme Court's subsequent decision in *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466 (1986) has undermined the entire basis upon which the Third Circuit's decision rested. Subsequent experience has shown that this contention is utterly without merit.

Finally, Petitioners seek to apply the procedural requisites of Federal Rule of Evidence 201 to proceedings in a state court. Unless this Court is prepared to ignore the express language of the Federal Rules of Evidence which makes them applicable solely to proceedings in the United States Courts and before United States Magistrates, the issue of whether or not the New Jersey Supreme Court satisfied the procedural requirements of Federal Rule of Evidence 201 cannot be reached.

ARGUMENT

I. THE OPINION OF THE THIRD CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT AND THE FIFTH CIRCUIT COURT OF APPEALS

Petitioners argue that the lead and concurring opinions of the Third Circuit Court of Appeals employed the offensive use of collateral estoppel in order to justify the distinction drawn by the New Jersey Supreme Court. However, this assertion ignores the fact that the limited issue before the Third Circuit was whether or not the New Jersey Supreme Court's denial of the state of the art defense to manufacturers of asbestos-containing products was rationally related to a legitimate governmental interest.

In answering this question in the affirmative, neither the lead nor concurring opinion employed the doctrine of collateral estoppel. Instead, both jurists merely observed that the actions of the New Jersey Supreme Court were, in part, based upon that court's recognition that the defense proffered by the appellees was, "as a matter of law, . . . doomed to fail". *In Re Asbestos Litigation*, 829 F.2d 1233, 1252 (Becker, J., concurring).

As the concurring opinion points out, *Beshada* and *Feldman* appear to be predicated upon the recitation of generally available knowledge set forth by the Fifth Circuit Court of Appeals in *Borel*. *In Re Asbestos Litigation*, 829 F.2d at 1246 n.3. (Becker, J., concurring). The recitation of generally available knowledge in *Borel* was based upon published studies in the public domain.[2]

---

2. In *Borel*, the Fifth Circuit set forth a litany of documentary evidence which had been published in scientific and medical journals as early as 1924 detailing the known harms of asbestos exposure. Included in this recitation was a reference to the various publications upon which petitioners rely. A review of this recitation reveals that:

(a) The ability of asbestos to create disease through inhalation

The existence of these studies is not disputed by petitioners. Indeed, the proffered defense of petitioners actually relies upon their existence.

Once New Jersey's doctrine of constructive knowledge is applied, it is clear that the defense proffered by petitioners is insufficient as a matter of law.[3] This

---

NOTES (*Continued*)

was known and accepted by the 1930's and;

(b) the technological means to prevent or reduce injurious exposure to asbestos through the application of ventilation techniques and personal respirator protection by educated workers was available by the 1930's. *Borel*, 493 F.2d at 1083 to 1086.

3. Petitioners' assertion that the jury verdict in *Conley v. Johns-Manville Sales Corp.*, No. 80-2841 (D.N.J. complaint filed Aug. 28, 1980), was necessarily based upon the state of the art defense can be easily disposed of here. In *Conley*, petitioners Owens Illinois, Inc., Keene Corporation, Pittsburgh Corning Corporation, The Celotex Corporation, and Eagle-Picher Industries did not challenge plaintiff's assertion that their asbestos-containing products were defective. Accordingly, at the conclusion of all of the evidence, the trial court granted plaintiff's motion for directed verdict on the issue of product defect as to their products. The only defendant to challenge the defectiveness of their asbestos-containing product was petitioner Raymark Industries, Inc. Raymark sought to distinguish its asbestos-containing product from those manufactured by the other defendants. This distinction was based primarily on Raymark's assertion that the normal use of their asbestos textile product did not release sufficient asbestos fiber to pose a hazard to health. Accordingly, defendant Raymark argued that a warning as to their particular product was unnecessary. Although the evidence in *Conley* differed slightly, a more detailed example of this type of defense can be found in the Fifth Circuit's opinion in *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1144 to 1145 (5th Cir. 1985). This defense is not dependent upon the historical state of the art. It is available to a defendant under either a *Beshada* or *Feldman* theory. A reading of special interrogatory number two which dealt with strict liability reveals that the question posed to the jury did not necessarily involve a determination of state of the art. Rather, the jury verdict was based upon a finding that the particular Raymark product in question did not require warnings in order to be safe for use. Given the fact that all other defendants had admitted the defectiveness of their products, it is highly unlikely that the jury verdict was based upon a state of the art defense. (Petitioners' App. at 242a).

analysis does not rely upon any prior jury verdict or judicial determination. As such, it does not employ the use of collateral estoppel. It was, as Judge Becker observed, an instance where the New Jersey Supreme Court fashioned a law with reference to reality. *Id.* at 1247 (Becker, J., concurring).

Thus, the Third Circuit's recognition that the New Jersey Supreme Court did not decide *Feldman* in a complete factual vacuum does not conflict with this Court's earlier pronouncements in *Blonder-Tongue*, *Parklane*, and *Kremer*.

Petitioners' contention that the Third Circuit's opinion directly conflicts with that of the Fifth Circuit in *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982), *rev'g* 509 F. Supp. 1353 (E.D. Tex. 1981), is likewise incorrect. The question before the Fifth Circuit in *Hardy* very clearly involved the correctness of the trial court's use of the doctrine of collateral estoppel. There, the trial court had sought to use the prior jury verdict and subsequent appellate ruling in *Borel* as the basis for collaterally estopping defendants from relitigating the question of whether or not their asbestos-containing products were unreasonably dangerous. In the instant case, the Third Circuit's decision was simply based upon their recognition that one basis for the *Feldman* decision was the New Jersey Supreme Court's realization that the defense proffered by the manufacturers of asbestos products, though sufficient under the law of some states, was insufficient as a matter of law under New Jersey's *Feldman* standard.

Additionally, a reading of *Hardy* reveals that the Fifth Circuit's refusal to employ collateral estoppel was based in large part upon its belief that ambiguities in the *Borel* jury verdict precluded its appellate decision in *Borel* from being read to necessarily hold that all asbestos-containing products were unreasonably dangerous under Texas product liability law. Under Texas law, a plaintiff must prove that a defendant knew or

should have known of the dangerous nature of its products before liabililty can attach. This burden is directly contrary to that expressed by the New Jersey Supreme Court in *Feldman*. There, a defendant must prove not only that it did not know of the dangers, but also that such dangers were unknowable even after the application of the constructive knowledge doctrine.

Accordingly, the profound differences in the issues before the two circuits precludes the finding of a genuine conflict between them.

In summary, the Third Circuit's decision does not conflict with this Court's prior holdings in *Blonder-Tongue* and *Parklane*. Similarly, the Third Circuit's decision does not conflict with that of the Fifth Circuit in *Hardy*. As such, a writ is unnecessary.

II. THE THIRD CIRCUIT CORRECTLY FOUND THAT THE NEW JERSEY SUPREME COURT'S CLASSIFICATION WAS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL INTEREST

As noted by both the lead and concurring opinions, one articulated basis for the New Jersey Supreme Court's classification was that court's recognition that the state of the art defense proffered by the asbestos defendants was insufficient as a matter of law once the *Feldman* constructive knowledge test was applied. Moreover, the lead opinion found that several other legitimate reasons existed for the application of *Beshada* in asbestos cases. Among these justifications were:

1. Simplification of the fact finding process and a resulting easing of plaintiff's burdens.

2. Reduction of jury confusion.

Petitioners' argument that any justification for the New Jersey Supreme Court's classification has been destroyed by its subsequent decision in *Fischer* has been shown to be without merit by subsequent events.

No clearer example of this could be found than in the District Court's ruling on petitioner's application for severance in the case of *Campolongo v. Celotex Corporation*, No. 82-2953 (D.N.J. March 1, 1988).

A case *sub judice*, *Campolongo* involved claims for damages arising from asbestos exposure. Plaintiff sought compensatory damages under both a strict liability *Beshada* theory as well as negligence principles. Moreover, plaintiff sought punitive damages against certain defendants under *Fischer*. In ruling on petitioner's motion for severance, the District Court combined *Beshada* principles with New Jersey's doctrine of concurrent cause to fashion a simplified and streamlined compensatory damage trial which precluded the introduction of conduct related proofs by any party.

As noted by the District Court, the elimination of conduct oriented defenses such as superseding cause or assumption of the risk would obviate the need for plaintiff to introduce conduct related proofs to rebut these defenses. The resulting severance order thus fashioned a compensatory damage trial which was greatly streamlined and which limited any possibility for jury confusion. The District Court's ruling was based, in part, upon its recognition that it was "illogical and unsound" for a defendant to posit a defense based upon the state of the art while at the same time arguing that a plaintiff or third party actually knew of the dangers involved with the use of the product. *Campolongo*, (App. 13a).[4]

---

4. Petitioner Raymark's position in *Wolozen v. Johns-Manville*, Civil Action No. 80-1413 (D.N.J. complaint filed May 15, 1980) provides a prime example. In *Wolozen*, a case *sub judice*, plaintiffs had advised defendants and the trial court that they were not claiming punitive damages from any defendant. Thereupon, petitioner made application to the trial court for leave to call a witness to identify a document entitled "Minimum Requirements For Safety and Industrial Health in Contract Shipyards" (Reprinted in the Appendix hereto at 25a to 61a). Petitioner sought to introduce this

Additionally, as the District Court noted, in a proper case the application of *Beshada* would allow a trial court to charge that certain asbestos-containing products without warnings were defective as a matter of law. Therefore, even in a case where severance was inappropriate, *Beshada* could still allow a trial court to simplify the fact finding process and ease jury confusion by removing the issue of product defect completely from the jury's consideration. *Campolongo*, (App. 11a, 12a).[5]

Moreover, the Third Circuit's observation that *Feldman* did not necessarily apply to all other non-asbestos products liability actions seems to be supported by a recent enactment of the New Jersey State Legislature. New Jersey Products Liability Act of 1987, N.J. Stat. Ann. §§ 2A:58C-1 to 2A:58C-7 (West 1987). Noting that there was an urgent need for remedial legislation to establish clear rules with respect to products liability actions, the state legislature enacted a broad ranging statute which clearly distinguishes between defendants in "environmental tort actions" and those in most other product liability actions. This act, which deals with both procedural and substantive protections, clearly shows that New Jersey's legislative and executive branches of government have joined the state judiciary in finding

---

NOTES (*Continued*)

document to show that as early as *1943*, plaintiff's employer actually knew the dangers involved in the use of petitioner's products. *Id.* (App. 31a, 35a). It is somewhat puzzling as to just how petitioner expected to argue that the dangers of its products were *unknowable* and, in the same breath, also argue that these dangers were actually *known* to plaintiff's employer.

5. The experience of *Campolongo* belies Petitioners' claim that unresolved questions remain concerning the proper application of *Beshada*, *Feldman*, and *Fischer*. These three cases set forth the substantive law of New Jersey. That law can and is being applied without difficulty by both federal and state trial courts. *See*, *Campolongo v. The Celotex Corp.*, (App. 9a) n.5.

that special considerations of environmental tort actions, such as asbestos litigation, require disparate treatment.[6]

Notwithstanding the colorful adjectives employed in the dissenting opinion, experience has shown the wisdom and correctness of the Third Circuit's reasoning. A rational basis does exist for the New Jersey Supreme Court's classification. In the hands of an able trial judge, *Beshada* provides a powerful tool for simplification of the fact finding process and reduction of jury confusion. These principles no doubt can be applied to other "non-typical" products liability actions involving toxic substances which cause disease only after a long latency period.

III. THE FEDERAL RULES OF EVIDENCE DO NOT APPLY TO PROCEEDINGS BEFORE A STATE SUPREME COURT

Petitioners' argument that the Third Circuit erred in failing to apply the standards of Federal Rule of Evidence 201 widely misses the mark. The Third Circuit and the Federal District Court below never took judicial notice of any fact in reaching their decision. In reality, petitioners' argument is an attempt to impose the requirements of a Federal Rule of Evidence upon the judicial system of a sovereign state.

By definition, the Federal Rules of Evidence apply only to proceedings in the United States Courts and before United States Magistrates. Fed. R. Evid. 101. Moreover, it has been settled law for fifty years that, in diversity cases, federal courts apply the substantive law

---

6. The trial court which originally decided *In The Matter of Asbestos Litigation Venued In Middlesex County* noted that the circumstances of *Beshada* could be applied to other types of product liability litigation such as D.E.S., Dioxin, or ground water pollution. *In The Matter of Asbestos Litigation Venued In Middlesex County*, transcript of proceedings of September 9, 1984 pg. 97 (App. 4a).

produced by the state legislature or the highest court of the state. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

In the overwhelming majority of instances, the decisional law of a state's highest court will result from review of state court proceedings in which the Federal Rules of Evidence were not applied. Petitioners' suggestion that the decisional law of a state's highest court is subject to review and reversal by virtue of its failure to adhere to principles set forth in a Federal Rule of Evidence is directly contrary to the Rules themselves, as well as the longstanding application of the *Erie* doctrine.

Moreover, as Judge Becker noted, petitioners herein had a full opportunity to proffer their defense in some detail before the New Jersey Supreme Court in its review of *In Re Asbestos Litigation Venued In Middlesex County*. What petitioners proffered was the same tired song which had been sung in *Borel* and again in *Beshada*. Most respectfully, petitioners' desire to repeat that song one more time does not warrant the granting of a writ by this Court.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

James C. Gavin
(Counsel of record)
GAVIN & GAVIN, P.A.
28 Tanner Street
Haddonfield, NJ 08033
(609) 429-8200

Attorneys for Respondents
Bruce E. Danfield, et ux.